

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma,)	
)	Case No. 4:05-cv-00329-GKF-PJC
)	
Plaintiff,)	
)	THE CARGILL DEFENDANTS’
vs.)	RESPONSE IN OPPOSITION TO
)	PLAINTIFFS’ MOTION IN LIMINE TO
Tyson Foods, Inc., et al.,)	PRECLUDE OPINION TESTIMONY OF
)	DR. ANDY DAVIS
Defendants.)	
)	

Plaintiffs move to prevent the jury from hearing the expert opinions of the Cargill Defendants’ hydrogeochemist Dr. Andy Davis, arguing that his testimony is unreliable and irrelevant. (Dkt. No. 2064.)

As described in his Report, Dr. Davis’ task “was to determine whether State data show if specific Cargill locations were responsible for any elevated phosphorus levels in Lake Tenkiller and/or the IRW.” (Davis R. at ES-1: Dkt. No. 2064-2.)¹ After analyzing the evidence in Plaintiffs’ database, Dr. Davis ultimately determined that the State’s data “do not demonstrate that individual Cargill contract grower-owned or Cargill-owned ... locations have affected adjacent receiving waters.” (*Id.*; see also Ex. A at 43 (“Based on my analysis of the data, there is no evidence that any of the Cargill locations have affected sediment, surface waters, or groundwater....”) It is this ultimate conclusion that Plaintiffs wish to keep from the jury.

To this end, Plaintiffs assert hyperbolic claims against Dr. Davis, going so far as to claim that “the methodology he used does not have a grounding in the methods and procedures of

¹ Despite arguing that the Court should exclude Dr. Davis’ opinions in their entirety, Plaintiffs provide this Court with nothing more than a single page from Dr. Davis’ detailed expert Report. The Cargill Defendants attach the Report (its corrected, final version) in its entirety as Exhibit A.

science” and that he used sediment samples “contrary to th[ose] universally used by all scientists.” (Dkt. No. 2064 at 5, 3.) This Court should deny Plaintiffs’ Daubert motion as meritless because Dr. Davis’ expert testimony is highly probative and thus will be helpful to the triers of fact, it is reliable, and Plaintiffs’ use of expert declarations in support of their motion is improper.

LEGAL STANDARD

If Dr. Davis’ proposed expert testimony is reliable, relevant, and will assist the jury, the Court should permit the jury to assess the testimony for itself. See, e.g., United States v. Nacchio, 555 F.3d 1234, 1241 (10th Cir. 2009) (citing, e.g., Fed. R. Evid. 702).

In making this determination, the Court must first assess whether Dr. Davis is “qualified ‘by knowledge, skill, experience, training, or education’ to render an opinion.” See id. (quoting Fed. R. Evid. 702). Dr. Davis holds a PhD in geology from the University of Colorado and a master’s degree in environmental sciences from the University of Virginia. (Ex. A: Davis R. at A-1.) He has published over 70 papers in peer-reviewed scientific literature, and has testified in eight different litigation matters during the last four years. (Id. at A-1 and attached CV.) Dr. Davis has over 25 years of professional experience in the field of hydrogeochemistry, primarily in evaluating the fate and transport of chemical compounds. (Id.) Indeed, despite claiming that his methods have no “grounding ... in science” and differ from those “universally used by all scientists,” Plaintiffs make **no** challenge to Dr. Davis’ qualifications to render any of his expert opinions. (See generally Dkt. No. 2064.)

Because Dr. Davis is undisputedly qualified, the Court’s evaluation centers on 1) whether his proposed opinion will assist the jury – that is, whether it is relevant, and 2) whether it is reliable, which the Court must determine “by assessing the underlying reasoning and

methodology.” Nacchio, 555 F.3d at 1241 (citations omitted); Fed. R. Evid. 702; accord McKenzie v. Benton, 388 F.3d 1342, 1352 (10th Cir. 2004). As the offering party, the Cargill Defendants must show that “the method employed” by Dr. Davis “is scientifically sound and that the opinion is based on facts which satisfy Rule 702’s reliability requirements.” Nacchio, 555 F.3d at 1241 (internal quotations and citations omitted). “The focus, of course, must be solely on principles and methodology, not on the conclusions they generate.” AG of Okla. v. Tyson Foods, Inc., 565 F.3d 769, 779-80 (10th Cir. 2009) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993)). “[W]hen experts employ established methods in their usual manner, a district court need not take issue under Daubert ...” Id. at 780.

A. Dr. Davis’ Testimony Is Highly Relevant and Will Help the Jury.

Dr. Davis set out to do what Plaintiffs here did not even attempt — he analyzed all of the relevant environmental data collected by the State to determine if there was any affirmative evidence of an environmental impact originating from any specific Cargill grower location. (Ex. A: Davis R. at 8-42.) He concluded there is not. (Id. at 43.) Plaintiffs’ experts undertook no such site-specific analyses particular to the Cargill Defendants, or indeed to any specific Defendant. (See Dkt. No. 2085-3: Fisher 9/3/08 Dep. at 83:12 – 84:5.) In short, Plaintiffs are excoriating Dr. Davis for doing what they and their own experts *failed* to do, despite bearing the burden of proof on their claims. Plaintiffs cannot tenably argue that opinion testimony directly analyzing Plaintiffs’ own evidence is somehow “irrelevant.” (See Pls.’ Mot. at 5-6: Dkt. No. 2064.) To the contrary, Dr. Davis’ opinions will directly “assist the trier of fact to understand the [State’s] evidence,” or in this instance the *lack* of such evidence. See Fed. R. Evid. 702.

Dr. Davis’ testimony and opinions will show that Plaintiffs have not garnered enough data to demonstrate the release of phosphates from any Cargill location to the waters of the IRW.

(Ex. A: Davis R. at 5.) First, Plaintiffs have failed to quantify other anthropogenic and natural sources of phosphorous compounds found in the IRW in proximity to Cargill locations. (Id.) Second, the data collected by the State was not “collected adequately, in a systematic manner, to convey the spatial and temporal variations in the ... IRW. Given the methodology employed by the State, the sampling locations and time of sample collection cannot and do not demonstrate a causal connection between the samples and the Cargill locations.” (Id.)

Further, Plaintiffs inaccurately depict the million-acre IRW as a homogenous region where every Defendant’s contract growers’ locations are identical, and assume that litter applied anywhere on any of this land will necessarily run off and transport phosphates to the waters of the IRW. (E.g., Pls.’ Mot. Partial Summ J. ¶ 48(d): Dkt. No. 2062 at 30, citing and attaching Engel 1/8/09 Dep. 239-40; Engel Dep. Vol. II at 457; Fisher 9/3/08 Dep. Vol. I at 84-85.) Dr. Davis’s site-by-site analysis of each of the 35 Cargill-related locations (see Ex. A: Davis R. at 8-42) demonstrates the fallacy in Plaintiffs’ logic and reveals a key flaw underlying the opinions of virtually all of Plaintiffs’ experts.

In reality, no two grower locations are identical. For instance, some are surrounded by anthropogenic sources of phosphates that Plaintiffs’ experts failed to consider in any of their analyses. (Ex. A: Davis R. at 5.) In addition, the terrain and drainage pathways in the IRW are diverse and complex and must be evaluated to develop whether there is any relationship between these hypothetical source locations and the waters of the IRW. (See id. at 5 & Appendix B.) Indeed, some locations are situated on flat grassy areas where runoff is non-existent (e.g., Ex. A at 26, 30, 41; Ex. B: Davis Dep. at 72:25–73:24); some are situated on hilltops where drainage pathways carry any potential runoff away from nearby waterways, and in one instance, away from the IRW (e.g., Ex. A at 9; Ex. B: Davis Dep. at 153:25 – 156:11).

Further, despite collecting approximately 10,000 environmental samples, Plaintiffs not only failed to collect any edge-of-field samples from any Cargill grower location, they neglected to collect any samples within a relevant radius (less than four miles) of seven of the total 35 IRW poultry growing locations related to the Cargill Defendants. (*Id.* at ES-1; see also id. at 8, 10, 16, 17, 18, 27, 32.) Plaintiffs and their experts simply have not gathered any data that would permit the determination of whether land application of litter in proximity to those seven locations have had any impact on the waters of the IRW.

In sum, Dr. Davis's opinions will be helpful to the jury in providing a true depiction of the diversity of terrain and grower operations in the IRW, and in demonstrating why the watershed-wide analysis the Plaintiffs have used to support their entire case fails to show environmental impacts by Cargill grower locations, or the growers of any Defendant in this lawsuit. Because Dr. Davis' opinions are highly probative of facts that will be at issue at trial, his opinion is relevant for purposes of Daubert and Federal of Evidence 702. See Nacchio, 555 F.3d at 1241; McKenzie, 388 F.3d at 1351.

B. Dr. Davis' Opinions Are Scientifically Reliable.

Plaintiffs contend that Dr. Davis' expert opinions are unreliable by hyperbolically asserting that "the methodology he used does not have a grounding in the methods and procedures of science." (Dkt. No. 2064 at 5.) Plaintiffs' two specific contentions are that 1) Davis should have performed analyses that Plaintiffs did not, and 2) should not have used wet-weight sediment concentrations in developing a sediment screening baseline for his analyses.

Far from lacking "a grounding ... in science," as described below, Dr. Davis analyzed the very data collected by Plaintiffs, which they contend characterizes the entire IRW, and evaluated that data to determine whether it provides any evidence that phosphates from a specific

Cargill-related location are impacting the waters or sediments of the IRW. (Ex. A: Davis R. at 6-7.) Plaintiffs' experts made a blanket assumption that poultry litter is generally applied in close proximity to the poultry house where it is generated. (Ex. C: Engel P.I. Tr. at 446-67; Dkt. No. 2085-3: Fisher 9/3/08 Dep. at 158:10 – 160:18; 3/5/09 Fisher Aff. ¶ 5: Dkt. No. 1913-6 at 3-5; Ex. D: Daniel 11/26/07 Dep. at 26-27; Ex. E: Chaubey 1/27/09 Dep. at 35; Pls.' Mot. Partial Summ. J. ¶ 30: "The vast majority of the poultry waste generated by Defendants' birds is and has been land applied throughout the IRW in close proximity to where it was generated.": Dkt. No. 2062 at 16.) Rather than starting from whole (and different) cloth, Dr. Davis worked forward from this premise of Plaintiffs' experts in order to rebut Plaintiffs' experts' contentions.

The major defect Plaintiffs' claim in Davis' methodology – "[t]he failure to determine whether poultry waste from the Cargill Defendants' birds had in fact been land applied on the specific fields" (Dkt. No. 2064 at 5) – may be levied just as strongly against Plaintiffs themselves in the first instance. While Plaintiffs' experts assumed litter was applied in close proximity to houses, they made no such specific determination as to the Cargill-related poultry operations. If Dr. Davis' mirroring of Plaintiffs' experts' own methodologies truly has no "grounding in the methods and procedures of science" such that the testimony fails under Daubert, then so, too, must Plaintiffs' entire expert causation case fail.

1. Plaintiffs' Hypocritical Criticism of Dr. Davis Reveals the Paucity in Their Own Expert Case Against All Defendants.

Plaintiffs argue that "[a]n analysis of whether poultry waste is applied upstream of a sampling location is essential for an investigator's evaluation of whether waste from a poultry growing operation has impacted a river or stream." (Id. at 5.) Plaintiffs thus urge the Court to exclude Dr. Davis' testimony on the ground that his methodology contains a "fatal flaw" because "he did not confirm that poultry waste ... had in fact been land applied on the specific fields to

which he was attempting to tie specific State sampling data.” (Dkt. No. 2064 at 1.)

As noted above, however, Plaintiffs’ own experts engaged in no site-specific analysis of particular locations where Cargill litter has actually been land-applied in the IRW and whether such litter impacts the sediments or surface waters of the Illinois River. (See Dkt. No. 2085-3: Fisher 9/3/08 Dep. at 83:12 – 84:5.) Plaintiffs failed themselves to avoid this purported “fatal flaw” or include this “essential” analysis in their expert case, despite the fact that they carry the burden of proof on all of their causes of action. Using Plaintiffs’ logic, this Court should dismiss all claims against the Cargill Defendants because Plaintiffs failed to produce evidence showing precisely where litter from a Cargill turkey was applied on the ground within the IRW, much less any determination that the litter or any of its constituents moved from the specific application site, over the land (sometimes for miles), down to the Illinois River, and ultimately to Lake Tenkiller. Plaintiffs’ reverse-circular reasoning does not undercut the validity of Dr. Davis’s opinions under Daubert.

2. Dr. Davis Modeled Potential Impacts Based on Assumptions Plaintiffs’ Espouse, and Found No Evidence Against the Cargill Defendants.

In the absence of comprehensive and specific evidence in the State’s database showing where litter resulting from the Cargill Defendants’ turkeys was applied to lands in the IRW, Dr. Davis’s model used the assumption asserted by Plaintiffs’ experts that litter must be applied to lands in proximity to grower locations.² (See Ex. C: Engel P.I. Tr. at 446:6 – 18; Dkt. No. 2085-

² The only available data in the record that details the location and amount of litter application are the ODAFF grower files. ODAFF records are only available for 6 of the 35 poultry farms considered by Dr. Davis. (See Ex. A: Davis R. at 8-13.) This data does not allow one to determine the specific location of litter application, as the ODAFF Solid Poultry Application Record Annual Report Form only requests limited information such as Section, Township, Range data. (See Ex. F: OKDA0006380.) This information only identifies the square mile on which litter was applied. (The Public Land Survey System (PLSS), *available at*

3: Fisher 9/3/08 Dep. at 158:10 – 160:18; 3/5/09 Fisher Aff. ¶ 5: Dkt. No. 1913-6 at 3-5.) Dr. Davis proceeded on the theory that the 35 Cargill-related locations are the active source of turkey litter generated in the IRW that is potentially attributable to the Cargill Defendants. (Ex. A: Davis R. at 6; Ex. B: Davis Dep. at 30:3-20.) This assumption is highly favorable to Plaintiffs, as it is logically certain that not all such litter is actually applied to lands within the IRW.

Dr. Davis next identified all the relevant factors that Plaintiffs' experts' opinions failed to acknowledge. He considered all of the topographic features at each location, the specific drainage pathways, natural processes, and other potential anthropogenic sources of phosphates. (Compare Ex. A: Davis R. at 6 and 8-42, with Dkt. No. 2085-3: Fisher Dep. at 83:12 – 84:5, 84:16 – 86:17; Dkt. No. 2092-1: Engel Dep. at 84:8-25, 457:9-15.) Dr. Davis then looked at the environmental sampling data relied on by Plaintiffs' experts to determine whether they showed any elevation in phosphate levels in sediments or surface water that could be traced back to litter applied at a Cargill-related location. (Compare Ex. A: Davis R. at 6 and 8-42, with Dkt. No. 2085-3: Fisher Dep. at 83:12 – 84:5, 84:16 – 86:17; Dkt. No. 2092-1: Engel Dep. at 84:8-25, 457:9-15.)

His analysis distinguished four classes of sites among the 35 Cargill-related locations:

- Seven locations of grower operations (out of the total 35) where Plaintiffs failed to collect any environmental samples whatsoever in relevant proximity. In the absence of any environmental data, no fate and transport of phosphates can be tied to these locations. (Ex. A: at Davis R. at ES-1, 8, 10, 16, 17, 18, 27, 32.)
- Nine other locations where Plaintiffs' environmental data shows no elevation in

http://www.nationalatlas.gov/articles/boundaries/a_plss.html.) Other location information provided on these forms is equally unhelpful in conducting a fate and transport analysis. (See e.g., Ex. F: OKDA0006380, indicating recipient of litter by Rural Route number.)

phosphates down gradient. In other words, the data proves the negative by showing affirmatively that these poultry operations cause no impact on the waters or sediments of the IRW. (Id. at ES-1, 12, 13, 14, 25, 28, 30, 33, 39, 40.)

- Two other locations where phosphates levels decreased in water and sediments down gradient from the grower operation. Again, Dr. Davis here proved the negative. (Id. at ES-1, 41, 42.)
- Seventeen other locations where other anthropogenic sources cannot be ruled out as the cause of apparent elevations in phosphate levels down gradient from Cargill-related sites. While phosphate levels may be elevated down gradient from these growers, Plaintiffs simply failed to account for other intervening natural processes and anthropogenic sources that could explain the elevations. (Id. at ES-1, 9, 11, 15, 19, 20, 21, 22, 23, 24, 26, 29, 31, 34, 35, 36, 37, 38.)

In sum, Dr. Davis found **no** sites where Plaintiffs' data showed that Cargill operations have negatively affected the waters or sediments of the IRW. (Id. at ES-1, 43.)

In addition, Plaintiffs err in claiming that counsel determined the proximate radius relevant to Dr. Davis' analysis. (See Dkt. No. 2064 at 2, citing Davis Dep. at 81-82: Dkt. No. 2064-3.) In the pages of deposition testimony cited by Plaintiffs, Dr. Davis testifies that counsel directed him to start his analysis with "the barns" and that counsel simply provided him with the pinpoint locations of the Cargill Defendants' contract growers' barns:

Q Okay. Who made the decision to use the location of the poultry barns for your analysis?

A I don't understand the question.

Q Well, you've said you looked at the Cargill sites specifically and the adjoining land around it.

A Uh-huh.

Q Who made the decision to look at the site of the barn for your analysis? I

mean, you've noted on your report – every time we look at a photo, you've noted the location of the barns, have you not basically?

A Yes.

Q Who made the decision to make that as your focal point in your analysis?

A That was what I was asked to do by legal counsel.

Q Okay, and did – who provided you the locations of those sites for your analysis?

A I got those from [counsel] Miss Collins.

(Ex. B: Davis Dep. at 81:9 – 82:2; also at Dkt. No. 2064-3.) The attorney thus only identified locations; the hydrogeochemist, no lawyer, determined the radius in which to gather relevant environmental sampling data in proximity to the poultry barns. (See Ex. A: Davis R. at 6.)

In addition, starting with Plaintiffs' experts' assumptions that litter is generally applied in close proximity to the place where it is generated, Dr. Davis also looked at drainage areas for each Cargill-related location to ensure that the selected sample data would reflect any effects from potential runoff from the fields close to the grower location. (Id.) Dr. Davis concluded that Plaintiffs failed to produce **any** environmental data tying any elevations in total phosphorus in the sediments and waters of the IRW directly to **any** Cargill-related location. (Id. at ES-1.)

Plaintiffs point to no valid reason – other than faults with their own underlying data – why this Court should find that Dr. Davis' analysis of Plaintiffs' data is anything other than reliable. The Court should deny Plaintiffs' groundless motion to exclude.

3. The May 18, 2009 Loftis Declaration Is Inapposite and the Court Should Disregard It.

Plaintiffs' motion relies on an accompanying declaration by non-testifying expert Dr. Jim Loftis to support the claim that it is "essential" to evaluate where litter has been applied to conduct a fate-and-transport analysis. (See Dkt. No. 2064 at 5, citing to Loftis Decl. ¶ 15; Dkt. No. 2064-5.) Even putting aside the issue of whether such a declaration by a non-testifying

expert is admissible³, the Court should reject this opinion and Plaintiffs' reliance on it to attack Dr. Davis.

First, the Loftis declaration does not even mention Dr. Davis, nor does it mention his firm, his work, his deposition transcript, or even his expert Report. Indeed, Dr. Loftis does not even claim to have ever read Dr. Davis' Report. (See generally Dkt. No. 2064-5, especially ¶¶ 5-6.) Instead, it appears that Plaintiffs' counsel are attempting to piggyback Dr. Loftis' assertions about other of Defendants' experts onto the instant motion challenging Dr. Davis. (See id. ¶¶ 5-6.) The Court should give no credence to Plaintiffs' arguments relying on the Loftis declaration.

Second, the opinion of Dr. Loftis that one must analyze upstream litter applications to evaluate whether such applications have impacted a water body (Dkt. No. 2064-5 ¶ 15) is actually contrary to the opinions expressed by Plaintiffs' principal disclosed testifying experts who maintain that one **need not** sample down gradient from every site where litter was applied to determine whether there is a specific effect. (See Dkt. No. 2085-3: Fisher Dep. at 83:12 – 84:5, 84:16 – 86:17; Dkt. No. 2092-1: Engel Dep. at 84:8-25, 457:9-15.) To rebut the opinions disclosed by Plaintiffs' testifying experts, Dr. Davis accepted for the sake of argument *those Plaintiffs' experts'* premise that litter is generally applied in proximity to the place where it was generated and that no such down gradient analysis was required. Plaintiffs cannot show that Dr. Davis' methodologies mirroring the work performed by Plaintiffs' disclosed experts are unreliable by changing Plaintiffs' own fundamental expert theory midstream through an inadmissible expert opinion. Because Dr. Davis' testimony is highly probative, reliable, and would help the jury understand the causation evidence at trial, the Court should allow it. See,

³ The Loftis Declaration filed by Plaintiffs at Dkt. Nos. 2064-5 (Davis), 2072-4 (Cowan), 2074-3 (Murphy), and 2083-3 (Johnson) is the subject of a separate motion to strike.

e.g., Nacchio, 555 F.3d at 1241.

4. Plaintiffs' Claims Regarding Davis' Use of Wet Weight Concentrations In Determining a Screening Baseline Fail As a Matter of Science and Logic.

Plaintiffs baldly argue that “the method used by Dr. Davis [to calculate his baseline] was erroneous and contrary to that ‘universally used by all scientists.’” (Dkt. No. 2064 at 2-3, quoting in part Olsen Decl.: Dkt. No. 2064-4.) In particular, Plaintiffs insist that Dr. Davis’ use of wet-weight concentrations from sediment samples to develop a baseline for unimpacted sediments somehow undermines his analysis. This criticism is unfounded and has no bearing on Dr. Davis’ opinions and conclusions.

At no point in this litigation have Plaintiffs attempted to identify a baseline for phosphates in sediment samples in the IRW. Without a reference for baseline, one cannot determine any specific impact to sediments and surface water in the IRW from anthropogenic sources of phosphates. (See Ex. A: Davis R. at 4.) For conservative screening purposes, Dr. Davis conducted a population study of all sediment samples collected in the streams of the IRW and thereby determined a screening criterion for baseline. Dr. Davis then identified samples that might be considered elevated above that baseline, which in turn might indicate a potential impact by runoff. (Id. at 3-4.) Dr. Davis explained that the value he used is not a regulatory standard but was simply used as a screening criterion. (Id. at 4.)

In attacking this methodology, Plaintiffs argue without elaboration in their brief that Dr. Davis “used the wrong data for sediment samples from the State’s database to calculate the baseline” (Dkt. No. 2064 at 2), and that the method he used “was unreliable because he used data for wet weight calculations rather than dry weight concentrations” (id. at 5). The meat of Plaintiffs’ baseline argument appears in the improper supporting declaration of testifying expert Dr. Roger Olsen, which offers opinions beyond those disclosed in his expert report. (See Dkt.

No. 2064-4.) (Dr. Olsen is himself the subject of a pending Daubert motion (Dkt. No. 2082), and his May 18, 2009 declaration issued in attack on Dr. Davis is the subject of a motion to strike.) Because this declaration amounts to nothing more than an untimely supplemental expert opinion published in violation of the Court's January 29, 2009 Order (Dkt. No. 1839), the Court should disregard it.

Regardless, Dr. Olsen wrongly insists that dry weight sediment concentrations are necessary for any statistical analysis. (See Dkt. No. 2064-6 at 3; see also Ex. G: Davis Decl. ¶ 7.)⁴ As acknowledged by Dr. Olsen, what is important is that the analysis is consistent, comparing apples to apples – for instance comparing wet weight sample concentrations to wet weight baseline values as Dr. Davis did, or comparing dry weight sample concentrations to other dry weight sample values as Olsen did when he compared his analyses to that of Plaintiffs' other expert Dr. Bernard Engel. (See Dkt. No. 2091-5: Olsen Dep. at 172:23 – 173:0; see also Ex. G: Davis Decl. ¶ 8.) Despite averring now that “dry weight concentrations are the only consistent and comparable results” and that they “are universally used by all scientists” (Dkt. No. 2064-4 at 3), Dr. Olsen identified both wet and dry weights in his summary of total phosphorus concentrations in sediments. (Olsen R. Table 18 at Appendix D: Dkt. No. 2089-2)

Dr. Davis used wet weight sample data because that is how the data was provided by Plaintiffs. (Davis Decl. ¶ 6.) Plaintiffs' new complaint that Dr. Davis' use of the data as provided by Plaintiffs renders Dr. Davis' baseline calculations invalid is no more than an effort to distract from the force of Dr. Davis' conclusions. Further, the majority of Davis' analyses rely upon water quality data rather than sediment data; thus, even if Dr. Davis' screening criteria for

⁴ Dr. Davis submits this limited declaration only to counter the new charges raised in the inappropriate declarations of Plaintiffs' experts Jim Loftis and Roger Olsen.

baseline total phosphorus concentrations in sediments was inaccurate in some way, this would not undermine his ultimate opinions. (Ex. A: Davis R. at 5; Ex. G: Davis Decl. ¶ 9.) The Court should deny Plaintiffs' meritless contention that Dr. Davis' opinions are unreliable because of his use of wet weights in reaching a baseline for total phosphorus concentrations in sediments.

Because Dr. Davis' principles and methodology are sound, the Court should deny Plaintiffs' motion. See, e.g., Tyson Foods, 565 F.3d at 779-80

CONCLUSION

For all of the reasons set forth above, the Cargill Defendants urge the Court to deny Plaintiffs' motion to exclude the expert testimony of Dr. Andy Davis.

Respectfully submitted,

June 5, 2009

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, PLLC

By: /s/ John H. Tucker

John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
100 W. Fifth St., Ste. 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Tel: (918) 582-1173
Fax: (918) 592-3390

FAEGRE & BENSON LLP
Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Tel: (612) 766-7000
Fax: (612) 766-1600

Attorneys for Defendants Cargill, Inc. and
Cargill Turkey Production, LLC

CERTIFICATE OF SERVICE

I certify that on the 5th day of June, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us

Melvin David Riggs
Joseph P. Lennart
Richard T. Garren
Sharon K. Weaver
Robert Allen Nance
Dorothy Sharon Gentry
David P. Page
Riggs Abney Neal Turpen Orbison & Lewis, P.C.

driggs@riggsabney.com
jlennart@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com
dpage@riggsabney.com

Louis W. Bullock
Bullock, Bullock and Blakemore, PLLC

lbullock@bullock-blakemore.com

William H. Narwold
Elizabeth C. Ward
Frederick C. Baker
Lee M. Heath
Elizabeth Claire Xidis
Fidelma L Fitzpatrick
Motley Rice LLC

bnarwold@motleyrice.com
lward@motleyrice.com
fbaker@motleyrice.com
lheath@motleyrice.com
cxidis@motleyrice.com
ffitzpatrick@motleyrice.com

COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen
Paula M. Buchwald
Patrick Michael Ryan
Ryan, Whaley & Coldiron, P.C.

sjantzen@ryanwhaley.com
pbuchwald@ryanwhaley.com
pryan@ryanwhaley.com

Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Gordon D. Todd
Sidley Austin LLP

mhopson@sidley.com
jjorgensen@sidley.com
twebster@sidley.com
gtodd@sidley.com

L Bryan Burns
Robert W. George

bryan.burs@tyson.com
robert.george@tyson.com

Michael R. Bond
Erin W. Thompson
Dustin R. Darst
Kutack Rock LLP

michael.bond@kutackrock.com
erin.thompson@kutackrock.com
dustin.dartst@kutackrock.com

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.;
AND COBB-VANTRESS, INC.**

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Woody Bassett
K.C. Dupps Tucker
Bassett Law Firm

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com
wbassett@bassettlawfirm.com
kctucker@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
Bruce W. Freeman
P. Joshua Wisley
Conner & Winters, LLLP

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com
jwisley@cwlaw.com

COUNSEL FOR SIMMONS FOODS, INC.

A. Scott McDaniel
Nicole M. Longwell
Philip D. Hixon
Craig Mirkes
McDaniel, Hixon, Longwell & Acord, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com
cmirkes@mhla-law.com

Sherry P. Bartley
Mitchell Williams Selig Gates & Woodyard
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mwsgw.com

Michael D. Graves

mgraves@hallestill.com

Dale Kenyon Williams, Jr.

kwilliams@hallestill.com

COUNSEL FOR CERTAIN POULTRY GROWERS

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green

Sidley Austin Brown & Wood LLP

1501 K Street NW

Washington, DC 20005

**COUNSEL FOR TYSON FOODS,
INC., TYSON POULTRY, INC.,
TYSON CHICKEN, INC.; AND
COBB-VANTRESS, INC.**

s/ John H. Tucker